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No. 651

In The
Supreme Court Of The United States

GARNETT SEAY and BILLY GADDIS
Petitioners

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI
FROM UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT CASE NUMBER 14955

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GARNETT SEAY and BILLY GADDIS
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vs.

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PETITION FOR WRIT OF CERTIORARI

Now comes GARNETT SEAY and BILLY GADDIS, the above named Petitioners, and file this their Petition for writ of certiorari, in the above stated case, and for grounds thereof say:

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Petitioners show that on the 14th day of December, 1954, the United States Court of Appeals for the Fifth Circuit, in case number 14955, rendered its judgment in the case of The United States of America against Garnett Seay and Billy Gaddis. Said judgment affirmed the judgment of the United States District Court for the Northern District of Georgia, Gainesville Division. Said judgment of the United States Court of Appeals has not been reported in an official reporter at this time. A copy of said opinion of the United States Court of Appeals rendered on the 14th day of December, 1954, is appended hereto marked "Exhibit A," and is by reference made a part of this petition.

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Petitioners show that the Supreme Court of the United

States has jurisdiction of the case at bar for the following grounds, to wit:

(a) That on the 14th day of December, 1954, the United States Court of Appeals for the Fifth Circuit rendered the opinion attached hereto as "Exhibit A," in which said Court decided a Federal question regarding the rule separation of witnesses in criminal proceeding, and a Federal question regarding the conduct of an Assistant United States District Attorney in a criminal prosecution, in a manner in conflict with applicable previous decisions of this Court.

(b) The United States Court of Appeals for the Fifth Circuit, in its opinion appended hereto as "Exhibit A" has approved the conduct of an Assistant United States District Attorney in said case, and by the Courts approval has so far departed from the usual accepted course of judicial proceedure in the present case so as to call for this Courts supervision, the issue involved being one of public policy and judicial practice.

(c) Petitioners show that on the 3rd day of January, 1955, they filed their motion for rehearing in said case and that on the 10th day of January, 1955, said motion for rehearing was, by the said United States Court of Appeals for the Fifth Circuit, denied; that on the 22nd day of January, 1955, petitioners petitioned the United States Court of Appeals for the Fifth Circuit for stay of mandate in the within case, and on the 24th day of January, 1955, said mandate was stayed for a period of thirty days from January 10th, 1955, provided that within thirty days from January 10th, 1955, there would be filed in the office of the clerk of the United States Court of Appeals for the Fifth Circuit, a certificate of the clerk of the Supreme Court of the United States that certiorari petition and record in the within case had been filed.

(d) Petitioners show that on the 7th day of February, 1955, they filed, in the Supreme Court of the United States,

their petition for an extention of time within which to file their petition for writ of certiorari in the within case, and that on the 9th day of February, 1955, the Supreme Court of the United States granted to petitioners an extension of time within which to file their petition for the writ of certiorari, said extension of time being to and including March 11th, 1955.

(e) Petitioners show that the Statutory provision conferring jurisdiction of this case upon the Supreme Court of the United States, is the Fifth Amendment of the Constitution of the United States of America. Petitioners aver that the sanction by the United States Court of Appeals of the conduct of the Assistant United States District Attorney in the present case, and the judgment of said Court, has deprived petitioners of their liberty without due process of law in violation of the Fifth Amendment to the Constitution of the United States of America.

Petitioners summary of the case is as follows:

On the 27th day of April, 1953, there was filed in the United States District Court for the Northern District of Georgia, Gainesville Division, an indictment of the United States of America against Garnett Seay, Billy Gaddis, Hubert C. Mabry, Richard Fricks and Arnold Obert Smith, charging them with violation of Section 371 Title 18 of the United States Code; violation of Section 2810 of Title 26, U. S. C.; violation of Section 2833, Title 26, U .S. C.; violation of Section 2834, Title 26, U. S. C.; violation of Section 3321, Title 26, U. S. C.; violation of Section 2803, Title 26, U. S. C.; and violation of Section 2810, Title 26, U. S. C. On the 7th day of October, 1953, petitioners Garnett Seay and Billy Gaddis entered their plea of not guilty, together with the plea of not guilty by the named defendant Hubert Mabry. The case, same being one for conspiracy to violate the internal revenue laws of the United States and to manufacture illicit whiskey, was called for trial on the 7th day of October, 1953.

Upon the call of the case of trial, the witnesses for all parties were called and sworn, and the rule of separation of said witnesses was invoked. One of the witnesses for the government was one Richard Fricks, one of the named Defendants in the indictment. He was sworn and separated from the other witnesses and court room. The case then proceeded to trial.

The government case rested entirely upon evidence given by an informer, Richard Fricks. Other government witnesses testified but none could link the Defendants Garnett Seay and Billy Gaddis with an offense of conspiracy The indictment was to the effect Garnett Seay, Billy Gaddis, Hubert Mabry, Claude Crane, Richard Fricks and Arnold Smith engaged in the manufacture of illicit whiskey. The indictment charged conspiracy and that said conspiracy was entered into by the named parties and began on or about June 1st, 1952 and continued until on or about August 1st, 1952. The evidence offered by the government illustrated that a distillery was found within 300 yards of the house of Arnold Smith; that Garnett Seay and Billy Gaddis approached Richard Fricks with a proposition to set up a still, and that pursuant to the conversation between Garnett Seay, Billy Gaddis and Richard Fricks, a distillery was set up and 4500 pounds of sugar was taken to Arnold Smiths house. The evidence further disclosed that certain materials were procured for the purpose of erecting said distillery; and it was shown that the distillery was found by officers at the named location. It was further established that said distillery was located a distance of 15 miles from the residence of Garnett Seay, and was located at the residence of one Arnold Smith.

During the course of the trial while one of the alleged conspirators, to wit, Richard Fricks, a government witness, was under cross-examination by counsel for the petitioners, it was positively established by said witness that the conspiracy began during the months of September and October of 1952. The indictment alleged that the conspiracy began on or about June 1st, 1952, and continued until about

August 1st, 1952. The informer government witness, Richard Fricks, further testified that the conspiracy began in the fall of the year during the cold season, and that it was in September and October of 1952, dates subsequent to the alleged overt acts.

After the above testimony for the government was given by the informer witness Richard Fricks, the Court took a recess. Following said recess, the said Richard Fricks government witness, was further cross-examined and he then testified that the date of the alleged conspiracy was between June and July of 1952. He positively denied talking to anyone during the recess and denied talking to the Assistant United States District Attorney during the said recess. Following his testimony, another government witness, the previous witness' wife, Mrs. Richard Fricks, was called to the stand to testify for the government. She testifed that the alleged conspiracy of petitioners was formed between June and July of 1952. She positively denied talking to any other witness about the case and denied talking to her husband Richard Fricks about the case, and denied talking to the Assistant United States District Attorney with regard to the dates previously testified to by her husband. She did admit talking to the said Assistant United States District Attorney during the said recess.

Pursuant to the testimony of the governments witness Mrs. Richard Fricks, the petitioners counsel requested that the Assistant United States District Attorney, Tysinger, be sworn as a witness, which was assented to by Said Tysinger. The said Assistant United States District Attorney, Mr. Tysinger, testified that during the aforementioned recess he had talked to Richard Fricks and Mrs Richard Fricks, two government witnesses, and instructed them that "there had been a litttle confusion with the petitioners cross-examination, and that Richard Fricks had got the dates later than the conspiracy showed and down into the fall of the year, when it was in the summer time," and that he, the said Assistant United States District Attorney,

during the said recess, had said to the government witness Richard Fricks, "You got a little out of order, my boy, on your dates because you didn't remember."

It was further brought out from the said Assistant United States District Attorney Tysinger, that he told the witness Mrs. Richard Fricks what her husband Richard Fricks, a government witness, had testifed, and that the said Richard Fricks had got the dates wrong in his testimony.

When the above facts were brought out, counsel for Garnett Seay and Billy Gaddis, promptly made a motion for mistrial, said motion being based on the violation of the rule of separation of witness by the Assistant United States District Attorney and the governments witnesses, and that the petitioners could not get a fair trial as a result of the conduct of the said Assistant United States District Attorney and the governments witness's violation of the rule of separation of witnesses. This motion was by the court overruled, and case submitted to the jury. The jury returned a verdict finding the petitioners Garnett Seay and Billy Gaddis guilty of conspiracy. They were sentenced by the Court, and motion for new trial was filed. Appeal was taken to the United States Court of Appeals for the Fifth Circuit where the judgment of the said Court (appended hereto as "Exhibited "A") affirmed the judgment of the District Court. Motion for rehearing was filed and denied.

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QUESTIONS PRESENTED FOR REVIEW

Petitioners show that the following questions are presented in the cause at bar for review by the Supreme Court of the United States:

(a) Petitioners assign error upon the judgment of the United States Court of Appeals for the Fifth Circuit, holding:

"After the motion for mistrial was made, the Court heard argument and carefully instructed the jury to the effect that the rule of exclusion of witnesses had been invoked, and that it was improper for an attorney to tell one witness what the preceding witness had testified .....

We agree with the Court below that the incident went only to the credibility of the witnesses; and since the jury was fully instructed on that point, we think that it did not constitute reversible error."

Petitioners contend that the Court erred in not declaring a mistrial based on the violation of the rule of separation of witnesses by the Assistant United States District Attorney. The question here presented, is whether or not the petitioners were accorded a fair trial in the cause at bar, considering the holding of the Court that the conduct of the said Assistant United States District Attorney was improper.

(b) The Fifth Amendment to the Constitution of the United States of America provides:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The question here presented for review is: Were the petitioners accorded due process of law in the trial of the

cause at bar, considering the violation of the rule of separation of witnesses by the Assistant United States District Attorney, and have the petitioners been deprived of their liberty without due process of law, considering the conduct of the said Assistant United States District Attorney in violating the rule of separation of witnesses in a criminal proceeding?

(c) Did the United States Court of Appeals for the Fifth Circuit decide the cause at bar in conflict with previous decisions of the Supreme Court of the United States?

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ARGUMENT AND CITATION OF AUTHORITIES

During the progress of the trial in the cause at bar, the evidence of the government had reached a state wherein a directed verdict of acquittal would have been demanded. The governments chief witness as to the conspiracy had testified that the alleged conspiracy had taken place during September and October, 1952, when it was alleged in the indictment that the conspiracy was formed between June and August, 1952. The government had sought to prove overt acts, but all had been confined to periods between June and August, 1952. With the governments' evidence such a state of conflict, the record discloses that the only evidence was that a conspiracy was formed by the petitioners AFTER the overt acts were allegedly committed. In such a state of record, the case could not have been submitted to the jurys consideration. At this stage of the trial, the Court took a recess.

It was during this recess that the Assistant United States District Attorney, Mr. Tysinger, went in the room where the witness, Richard Fricks, who had previously testified as to the formation of the conspiracy being in September and October 1952, was and informed the said witness Richard Fricks that he had erred in his testimony and that the dates testified to by him were wrong, and

then instructed the said Richard Fricks to return to the witness stand and testify that the conspiracy was formed between June and July of 1952, as alleged in the indictment against petitioners. The witness, Richard Fricks, obeyed the Assistant United States District Attorney and returned to the witness stand and testified as instructed.

The Assistant United States District Attorney, Mr. Tysinger, then went to the room where the witness Mrs. Richard Fricks was, and told her what her husband, Richard Fricks, had testified, and told her that her said husband had testifed the wrong dates. Pursuant to this information, the government witness Mrs. Richard Fricks testified that the alleged conspiracy took place between June and July of 1952.

In it well to note that, upon cross-examination, Mrs. Richard Fricks and Richard Fricks, government witnesses, both positively denied that they had talked to the Assistant United States District Attorney, Mr. Tysinger, during the aforementioned recess. At this point, defense counsel requested the Assistant United States District Attorney, Mr. Tysinger, be sworn as a witness. He testifed that he had committed the above violations of the rule of separation of witnesses, and that he had told both witnesses what had been testifed and that he told them to change the dates in their testimony to follow the indictment.

Petitioners contend that this conduct is not only improper and reprehensible, but that the violation of the rule of separation of witnesses deprived them of a fair trial; and that their subsequent conviction, based on such testimony obtained by violating the rule of separation of witnesses deprived petitioners of their liberty without due process of law.

> "The prime purpose of the rule permitting exclusion of witnesses at trial is to prevent witnesses from matching narratives."
>
> WITT vs. UNITED STATES, 196 F. 2d. 285 (1)

The decision of the United States Court of Appeals for the Fifth Circuits, in the cause at bar, is in conflict with previous decisions of this Court, chiefly the case of CRAWFORD vs. UNITED STATES, 212 U. S. 183; 53 L. Ed. 465; 29 S. Ct. 260, where it was held by this Court:

> "There is a presumption of harm arising from the existence of an error committed by a trial Court against the party complaining, in excluding material evidence on a trial, especially before a jury. It is only in cases where the absence of harm is clearly shown from the record that such an error against a party seeking to review it is not cause for the reversal of the judgment . . . ." Said case holds further:

> "A felon, being also a confessed accomplice, was thus produced by the government as a witness for the purpose of proving its case against the Defendant, the witness having, as it would appear in popular language, turned 'state evidence,' at least so far as to incriminate himself together with Defendant. Without his evidence it would have been difficult, if not impossible, to convict the Defendant. No reflection is intended or intimated with regard to this action on the part of the government. It was wholly within the discretion of its law officers and their decision ought not to be reviewed by the Court. But the evidence of a witness, situated as was Lorenz (Richard Fricks in the cause at bar) is not to be taken as that of an ordinary witness of good character in a case, whose testimony is generally and prima facie supposed to be correct. On the contrary the evidence of such a witness ought to be received with suspicion, and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses. In many jurisdictions such a man is an incompetent witness un-

> less he has been pardoned. The facts surrounding the case make it particularly important that the rule in regard to material errors should be most rigidly adherred to. IF IT BE NOT CLEAR THAT NO HARM COULD HAVE RESULTED FROM THE COMMISSION OF THIS MATERIAL ERROR, THE JUDGMENT SHOULD HAVE BEEN REVERSED." (Emphasis Supplied).

Petitioners contend that the United States Court of Appeals for the Fifth Circuit overlooked the case of BERGER vs. UNITED STATES, 295 U. S. 78, 88; 55 S. Ct. 629; 79 L. Ed. 1314, wherein it was held:

> "It is only when the fact so clearly appears that an error challenged did not prejudice, and could not have prejudiced the complaining party, that the rule that error without prejudice is no ground for reversal is applicable."

In the cause at bar, the District Court and the Court of Appeals held that the conduct of the Assistant United States District Attorney, in violating the rule of separation of witnesses, was improper. We insist that it was error, prejudicial and reversible. The record does not show that his conduct was harmless, but on the contrary petitioners were convicted on the testimony gained by violation of the rule of separation of witnesses.

Petitioners contend that the United States Court of Appeals for the Fifth Circuit, in its opinion rendered affirmed the judgment of the District Court, decided the questions raised in a manner not in harmony with its previous decisions and has set a precedent by said opinion and judgment that is violative of the due process clause of the Constitution of the United States..

> "A defendant charged with crime has a right to a fair and impartial trial according to law, and the law does not provide one method for trying innocent persons and another for trying guilty

persons, as all persons charged with crime are presumed to be innocent until they are proven guilty beyond a reasonable doubt, according to the established methods of procedure. The States Attorney is a sworn officer of the Court and it is his official duty to see that the Defendant has such fair and impartial trial. While errors are sometimes committed by counsel through eagerness to win a lawsuit, yet there is nothing in the duty of a state's attorney which required him to prejudice the right of a Defendant to a fair trial in an eagerness to secure a conviction."

UNITED STATES vs. RAGAN, 86 F. Supp. 382-388

In the case of BERGER vs. U. S., supra, this Court held:

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.

IT IS AS MUCH HIS DUTY TO REFRAIN FROM IMPROPER METHODS CALCULATED TO PRODUCE A WRONGFUL CONVICTION AS IT IS TO USE EVERY LEGITIMATE MEANS TO BRING A JUST ONE ABOUT.

IT IS FAIR TO SAY THAT THE AVERAGE JURY IN A GREATER OR LESS DEGREE,

HAS CONFIDENCE THAT THESE OBLIGATIONS, WHICH SO PLAINLY REST UPON THE PROSECUTING ATTORNEY, WILL BE FAITHFULLY PRESERVED. CONSEQUENTLY, IMPROPER SUGGESTIONS, INSINUATIONS AND ESPECIALLY ASSERTIONS OF PERSONAL KNOWLEDGE ARE APT TO CARRY MUCH WEIGHT AGAINST THE ACCUSED WHEN THEY SHOULD PROPERLY CARRY NONE." (Emphasis Supplied).

Petitioners insist that the conduct of the Assistant United States District Attorney was error and of such magnitude and prejudice as to be grounds for mistrial and grounds for reversal of the judgment of the United States Court of Appeals in the cause at bar. Petitioners were entitled to a fair trial, and after the evidence produced by the government failed to meet the requirements for conviction, petitioners were entitled to be released. Petitioners were entitled to protection afforded by the rule of separation of witnesses, and the conduct of the Assistant United States District Attorney deprived petitioners of this right.

WHEREFORE, Petitioners pray that a writ of certiorari be granted, and that the judgment and decision of the United States Court of Appeals for the Fifth Circuit, in case number 14955, the cause at bar, be reviewed and said judgment reversed.

Frank B. Stow

Robert E. Andrews

ATTORNEYS FOR PETITIONERS

IN THE

United States Court Of Appeals

FOR THE FIFTH CIRCUIT

No. 14955

GARNETT SEAY and BILLY GADDIS

Appellants,

versus

UNITED STATES OF AMERICA

Appellee.

Appeal from the United States District Court for the Northern District of Georgia

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(December 14, 1954.)

Before HOLMES, BORAH, and RUSSELL, Circuit Judges.

HOLMES, Circuit Judge: Appellants, along with three co-defendants, were indicted for a conspiracy to violate the laws of the United States pertaining to the unlawful and fraudulent manufacture, possession, transportation, removal, concealment, sale, and distribution of non-tax-paid distilled spirits. Sections 2803, 2810, 2833, 2834, and 3321 of Title 26 of the United States Code. Two of the defendants entered pleas of guilty, and furnished most of the evidence against the appellants. Appellants, Gar-

nett Seay and Billy Gaddis, were each convicted on the conspiracy count, and Gaddis was convicted also upon a substantive count of working in a distillery for the production of spirituous liquors, upon which no sign bearing the words "Registered Distillery" was placed and kept as required by law, in violation of Section 2831, Title 26 U.S.C.

The evidence shows that, in June or July, 1952, the appellants approached Richard Fricks and asked him to make some liquor for them. Pursuant to this conversation it was agreed that Seay would furnish the sugar and distillery equipment, and that Fricks would furnish one helper. Seay and Fricks were to divide the profits. The night following said conversation, Seay delivered 4500 pounds of sugar to Fricks' house, and subsequently delivered the distillery apparatus. Fricks hired one Arnold Smith to aid in the operation of the distillery, which was erected 300 yards from Smith's house, with all of the co-conspirators except Seay performing the actual labor. Thereafter, sugar was moved from Fricks' house to the distillery, where the operation of the distillery extended over a period of two weeks. The finished product was stored in Smith's house until it was removed at various times by Gaddis, Seay, and others. About 400 gallons of liquor were manufactured at the distillery before it was discovered and raided by federal agents.

The indictment charged that the conspiracy commenced on or about June 1, 1952, and continued until August 1, 1952. After pleading guilty and testifying for the prosecution as to facts relating to the conspiracy, Fricks, on cross-examination, stated that the illegal operation took place in September or October. After the court had recessed and reconvened, he changed his testimony, stating that he had met Seay in June. Fricks' wife testified that, during the recess, the prosecuting attorney had told her that there had been some confusion in Fricks' testimony as to

the dates of the conspiracy; that while talking to her, Fricks had come up and the prosecuting attorney had said to him: "You got a little out of order, my boy, on your dates, because you didn't remember." When the above facts were brought out, the appellants made a motion for a mistrial based upon the violation of the rule of separation of witnesses. The court overruled the motion, but instructed the jury which heard all of the testimony, that it could consider what had happened in determining the credibility of the witnesses.

Two errors are assigned on appeal. First, appellants contend that the conflicts in the evidence were of such magnitude and materiality as to be wholly irreconcilable with the verdict. We think that the evidence does not present any more than the usual conflicts, and that the jury resolved them against the appellants. The other point raised by appellants is that the court erred in not granting the motion for a mistrial. After the motion for mistrial was made, the court heard argument and carefully instructed the jury to the effect that the rule of exclusion of witnesses had been invoked, and that it was improper for an attorney to tell one witness what the preceding witness had testified. The court then instructed the jury to consider all the circumstances in determining just what weight and credit it would give to the testimony of Mr. and Mrs. Fricks.

We agree with the court below that the incident went only to the credibility of the witnesses; and, since the jury was fully instructed upon that point, we think that it did not constitute reversible error. Furthermore, the date of the conspiracy was amply proven by other evidence. Accordingly, the judgment appealed from is affirmed.

AFFIRMED

EXHIBIT "A"

CERTIFICATE OF SERVICE

I, ROBERT E. ANDREWS, of counsel for the petitioners named in the foregoing petition for writ of certiorari, do hereby certify that I have this day served a copy of the within petition for writ of certiorari upon Honorable Simon Sopeloff, Solicitor-General of the United States of America, by depositing a copy of same in the United States mail, addressed to Honorable Simon Sopeloff, Solicitor-General of the United States of America, Department of Justice, Washington, 25, D. C., with sufficient postage to cause the same to be delivered to him in due course of United States Mail.

I further certify that I have this day served a copy of the within petition for writ of certiorari upon Honorable James W. Dorsey, United States District Attorney for the Northern District of Georgia, by depositing a copy of same in the United States mail addressed to Honorable James W. Dorsey, United States District Attorney, Old Post Office Building, Atlanta, Georgia, with sufficient postage to cause the same to be delivered to him in due course of United States mail.

This 7th day of March, 1955.

Robert E. Andrews

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 651

GARNETT SEAY AND BILLY GADDIS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 15–18) is reported at 217 F. 2d 572.

JURISDICTION

The judgment of the Court of Appeals was entered on December 14, 1954, and a petition for rehearing was denied January 10, 1955. On February 9, 1955, the time for filing a petition for a writ of certiorari was extended by Mr. Justice Black to March 11, 1955. The petition was filed on March 10, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether, under the circumstances of the case, the trial court should have declared a mistrial, following a single incident involving counsel and a witness who had become confused on dates, where the matter was fully developed before the jury who were instructed to consider it on the question of credibility, and where there was other evidence with respect to the significant dates.

STATEMENT

In the United States District Court for the Northern District of Georgia, the two petitioners, Garrett Seay and Billy Gaddis, were indicted, along with three co-defendants, for a conspiracy to violate various statutes relating to distilled spirits and for certain acts done in violation of these laws (R. 1–6). Two defendants, Richard Fricks and Arnold Smith, pleaded guilty (R. 60, 143). The remaining three defendants, including petitioners Seay and Gaddis, were found guilty on the conspiracy count and Gaddis was found guilty on the substantive charge of working at an unregistered still (R. 230). Seay was sentenced to three years' imprisonment and Gaddis to imprisonment for eighteen months (R. 231–235). On appeal, the judgments against petitioners were unanimously affirmed (Pet. 15–17).

1. *General summary of evidence.*—The government showed that a still, of a type commonly called a groundhog, was found by revenue agents

near the home of one Arnold Smith on July 24, 1952 (R. 33). The agents thereupon destroyed the still (R. 35). In October 1952, Gaddis admitted having worked at that still, but would otherwise give no information with respect thereto (R. 18–19, 40).

Defendant Richard Fricks testified, *inter alia,* as follows: One day, when he was cutting wood pulp, he met Seay and Gaddis, and Seay asked if he would be interested in making liquor (R. 62–63). That evening Seay brought to Fricks' house two loads of sugar and asked Fricks to repack them and burn the paper bags in which they were brought (R. 64–65). The next day, Seay and Gaddis came back with sugar and malt (R. 66). Fricks, Gaddis, Smith, and Crane dug holes back of Smith's house and set up six groundhog stills (R. 68–69). Seay arranged to have Gaddis board with Fricks while he was working at the stills (R. 73–74). Fricks received $35 from Seay which he gave to Smith (R. 82). Fricks also testified that, while he did not "make a run" at the stills (R. 71), he saw Seay and one Mabry haul liquor away from Smith's house (R. 80–81, 100–101).

Fricks' testimony was in general [1] confirmed by that of Arnold Smith (R. 131–157), Claude Crane

[1] There were differences in detail. For example, Fricks testified that Seay brought the lumber for the stills (R. 69) whereas Smith testified that he and Fricks went to get the lumber (R. 133). Fricks testified that Seay hauled two loads of liquor (R. 80), whereas Smith said he took one (R. 154).

(R. 157–172) and Fricks' wife (R. 177–188). Smith and Crane testified that they made liquor at the still, together with Gaddis (R. 139, 158–159, 170), and Smith testified that the liquor was stored at his home (R. 140, 145–146). Smith and Mrs. Fricks testified that the still was started in June 1952 (R. 145, 155, 188).

Petitioners did not take the stand and did not offer any evidence relating to the matters on which they were charged. The only two witnesses, who were called on their behalf, testified solely as to the poor character and reputation of government witnesses Richard Fricks and Crane (R. 209–212).

2. *Facts bearing on the motion for a mistrial.*— The conspiracy count of the indictment alleged that petitioners and others had entered into an agreement to operate an unregistered still in the latter part of June 1952 and that various overt acts in furtherance of the conspiracy were committed in July 1952 (R. 3–5). At the commencement of the trial, which was held in October 1953, petitioners' counsel had invoked the rule to exclude prospective witnesses from the courtroom while testimony was being given (R. 8).

Fricks, who was 32 years old and could neither read nor write (R. 61, 82), had not, on direct examination, placed the date of his encounter with Gaddis and Seay except that it was one day when he was cutting wood (R. 62). On cross-examination, when first asked about the date, he

said it was in 1942, but changed that to 1952 (R. 87). He testified that he could not remember the month in 1952, but thought it was "along in the summertime, up toward fall of the year" (R. 90), maybe October (R. 90–92). After a recess during his cross-examination (R. 109), he testified that the events had occurred in June (R. 117–118). He said no one had talked to him about the change of dates (R. 118), that he had not talked with government counsel and had not seen counsel talking with his wife in the witness room during recess (R. 123–124). When Mrs. Fricks was on the stand, she testified that Seay brought the sugar to the house in June (R. 188). She stated that she had talked with government counsel (R. 188), and that he had said something about her husband forgetting the date (R. 189–190). She also testified that he did not tell her anything, and that she already knew the date (R. 189, 190). She said she did not talk to her husband about the date (R. 191).

Government counsel was thereupon called to the stand and testified, in the presence of the jury, as follows: During the recess taken while Fricks was testifying, he talked with Mrs. Fricks and told her that she would probably be the next witness, and that Mr. Fricks had been a little confused by defendants' counsel's cross-examination as to the dates of the conspiracy (R. 193). During this conversation, Mr. Fricks came by and

government counsel remarked to him "You got a little out of order, my boy, on your dates, because you didn't remember" (R. 194).[2]

Petitioners' counsel moved for a mistrial on the basis of this testimony (R. 196). The judge, after hearing argument in the absence of the jury (R. 197–204), denied the motion (R. 205). On recalling the jury, he specially instructed them regarding this incident, as follows (R. 204–205):

> Gentlemen of the Jury, it is the law that persons trying cases, both civil and criminal, have the right to have the witnesses excluded from the Courtroom, sent out where the one witness would not hear another witness testify, and that primarily is the object of sending the witnesses out of the Courtroom where one witness cannot know what another witness has testified in that particular trial. Of course, it is improper for one of the attorneys connected with the case to tell one witness what the preceding witness has testified because that conceivably might have some influence on the testimony that this witness is to deliver. You have heard the testimony of these two witnesses, Mr. Fricks and Mrs. Fricks, and you have also heard Mr. Tysinger's statement with respect to his conversation with them. Now, I instruct you that you may

[2] When Fricks was recalled, he testified that he had forgotten that government counsel had talked with his wife during recess. He again testified that government counsel had not talked to him. (R. 207.)

> consider all of those circumstances in determining just what weight and credit you will give to the testimony of Mr. and Mrs. Fricks. Their credibility is a matter entirely for your determination, and you may, of course, consider all the facts and circumstances of the case in determining just what weight and credit you will give to their testimony, but I particularly instruct you that you may also consider the fact that Mr. Tysinger did talk to Mrs. Fricks, and also to Mr. Fricks after Mr. Fricks had first testified and before he testified a second time, and before his wife testified, and in determining what weight and credit you will give to the testimony of Mr. Fricks and Mrs. Fricks you may consider those facts and circumstances.

In affirming petitioners' convictions, the Court of Appeals considered the matter and concluded that the trial court had properly handled the incident since it "went only to the credibility of the witnesses; and since the jury was fully instructed upon that point" (Pet. 17).

ARGUMENT

The decision below is clearly correct and no conflict or question of importance is presented.

The sole issue is whether, under the circumstances of the case, petitioners were denied a fair trial by reason of the single incident involving government counsel's conversation with Mrs. Fricks and his incidental remark to Mr. Fricks

that "You got a little out of order, my boy, on your dates". As has already been pointed out, *supra,* pp. 5–6, the facts relating to this incident were fully developed by testimony before the jury (R. 193–195). Thereafter, before any further testimony was taken, the trial judge correctly informed the jury regarding the incident and told them that they might specifically consider it in determining the credibility of both Mr. and Mrs. Fricks' testimony (R. 204–215). Obviously, under the circumstances, the incident could not have had any adverse effect on the verdict.

This conclusion is further reinforced by a review of the record as a whole, which shows that Mr. Fricks was so obviously mistaken in fixing the date of his own and of petitioners' participation in the illegal distilling enterprise several months after the still had been seized, that it would have been clear to the jury, without any change of testimony by Fricks, that he was confused as to dates.[3] Since the still had been seized in July 1952 it was evident that the meeting with Seay and Gaddis to which Fricks testified could not have occurred in October 1952. Other witnesses also definitely placed the conspiracy in June 1952. (See *supra,* p. 4.)

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[3] Mr. Fricks had stated that he did not remember which month the incident occurred (R. 90–91) and stated it was "along in the summertime, up toward fall of the year," before stating that it might have been in October.

There is no testimony that the prosecutor told either Mr. or Mrs. Fricks what the correct dates were; he merely called their attention to the fact that Mr. Fricks had, on cross-examination, become confused. If Fricks had not changed his testimony during cross-examination, government counsel could properly have called his attention to inconsistencies between his testimony on the stand and any prior statements he had made. See *Hyde* v. *United States,* 225 U. S. 347, 377–378; *Hickory* v. *United States,* 151 U. S. 303, 309. That he mentioned this out of the presence of the jury after the rule on witnesses had been invoked may perhaps have been improper, but certainly it was not under the circumstances prejudicial nor did it operate to deprive petitioners of a fair trial.

We, of course, recognize that this Court has repeatedly indicated that the doctrine of harmless error is not one to be invoked indiscriminately in criminal cases. In the leading case of *Kotteakos* v. *United States,* 328 U. S. 750, 764–765, the harmless error rule was thus stated:

> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. * * * But if one cannot say, with fair assurance, after pondering all that happened without stripping

> the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

See also *Bollenbach* v. *United States,* 326 U. S. 607, 614–615. Whether the incident here is judged in accordance with this standard, or even in accordance with the earlier standard of *Crawford* v. *United States,* 212 U. S. 183, 203, which was decided before the enactment of the federal harmless error statute, 40 Stat. 1181, 28 U. S. C. (1946 ed.) 391,[4] it is wholly evident that the incident could not have harmed petitioners, particularly in view of the way in which the matter was handled by the trial judge.

The judge's careful instructions to the jury placed the incident in proper perspective and fully protected petitioners' rights. In fact it is at least as probable as not that the testimony respecting the recess incident if anything aided

[4] The statute has been superseded in criminal cases by Rule 52 (a) of the Federal Rules of Criminal Procedure, which did not in any way alter the scope of the harmless error doctrine. See *Bihn* v. *United States,* 328 U. S. 633, 638.

petitioners by casting somewhat greater doubt on the credibility of the Fricks than was actually warranted. Under these circumstances, the trial judge correctly denied petitioners' motion for a mistrial. His ruling with respect thereto presents no issue for which there is any occasion for further review by this Court.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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